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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 534

J. W. SPENCE, DOING BUSINESS AS GEFF SEED AND GRAIN COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF AMICUS CURIAE BY ILLINOIS AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

CONSENTS.

The Illinois Agricultural Association has received the written consent of both J. W. Spence, doing business as Geff Seed and Grain Company, Petitioner by and through his attorneys, Leslie N. Jones, Francis S. Feiger, John C. Robison and Gerald T. Quindry and of The Baltimore and Ohio Railroad Company, a Corporation, Respondent by and

through its attorneys, Graham and Graham to the filing of this brief Amicus Curiae prior to the consideration by the Court of the Petition for Writ of Certiorari and the same have been filed with the Clerk of this Court.

THE INTEREST OF ILLINOIS AGRICULTURAL ASSOCIATION.

The Illinois Agricultural Association is a not-for-profit general farm membership corporation organized for the purpose of promoting agriculture and the mutual interests of its farmer members therein. It is organized under the laws of the State of Illinois having its principal office at 1701 Towanda Avenue, Bloomington, Illinois 61701 and has as its members 195,000 families resident throughout the State of Illinois who are engaged in some form of farming. Although the Illinois Agricultural Association is not a party to this proceeding, the issues involved herein vitally affect its members. Lack of sufficient railroad cars yearly causes considerable loss to Illinois farmers not only by reducing proceeds from crops for want of timely access to markets but also by deterioration in the product as where the grain has had to lay on the ground because of the impossibility of moving it.

Petitioner is of course vitally concerned in this case because it affects its own business, but we submit that the problem is much broader in its effects and consequences. FS Services, Inc., a farmer cooperative affiliated with the Illinois Agricultural Association is not only a manufacturer and distributor of farm supplies to farmers in Illinois, Iowa and Wisconsin, but has 40 local member companies who are engaged in grain marketing, operating 75 grain elevators. Another Illinois Agricultural Association affiliated farmer cooperative, Illinois Grain Corporation, has additionally some 217 member companies who are engaged

in the cooperative marketing of grain at many locations throughout the State of Illinois.

The Illinois Agricultural Association during the last several years has received numerous requests from these companies and from individual farmers located throughout the State of Illinois urging the Association to take all necessary and proper action to induce the railroads to alleviate railroad car shortages. Complaints to Illinois Agricultural Association from grain companies and individual farmers concerning serious railroad car shortages have not only been leveled against Respondent, but have also included the other railroads operating in the State of Illinois; and have not only involved the inability for lack of cars to transport soybeans, but have also involved the inability to transport many other agricultural supplies and products for the same reason.

In addition to the foregoing, the source of basic products used by the said FS Services, Inc. in its manufacturing plants originates in various parts of the United States and Canada. This company, which manufactures and distributes, among other farm supplies, a great portion of the fertilizer used on the farms of Illinois, Iowa and Wisconsin, like other similar fertilizer companies, has been seriously hampered by the car supply problem. These companies use the same types of equipment as do the grain elevators, thus increasing the existing problem. The member grain companies mentioned heretofore ship many carloads of grain to various destinations throughout the United States. Due to the inability of the rail carrier to furnish adequate amounts of equipment, many shipments have had to be curtailed in previous years and there is apparently no relief possible without the aid of this court.

These facts clearly demonstrate that the problem is truly national in scope.

ARGUMENT.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals Leaves Petitioner and Others Suffering Loss From Car Shortages With No Effective Remedy.

The decision of the Court of Appeals for the Seventh Circuit which appears as *Appendix A* at page 6 *et seq.* in the *Petition for Writ of Certiorari* holds that the Petitioner has no judicial remedy, but that there is an issue for the Interstate Commerce Commission to decide. This issue, it is stated, is the reasonableness of the defendant's method of car distribution for seasonal loading during a temporary car shortage. The Interstate Commerce Commission in its brief Amicus Curiae filed with the Court of Appeals in the case, Page 9 *et seq.*, however, indicated that it had no authority under the Interstate Commerce Act to grant any effective remedy so far as requiring the railroads to have available adequate amounts of equipment. We thus have the impossible situation that the issue raised here cannot be answered by the Commerce Commission for it can only decide that the Petitioner is entitled to more existing cars, or that he is not entitled to more existing cars. The only issue on a further appeal would be the reasonableness and propriety of that order. The question here raised, as to whether or not the railroad has a responsibility to furnish reasonable transportation to the Petitioner and the others by having available an adequate number of suitable cars to reasonably meet the demands of all shippers, and whether this duty can be enforced in a court of law, will not be determined.

2. The Court of Appeals Has Erroneously Applied the Law as Determined by This Court.

The case cited by the Court of Appeals to support its conclusion is *Baltimore & O. R. R.* v. *United States ex rel. Pitcairn Coal Co.* (1910), 215 U. S. 481, 493, 30 S. Ct. 164, 169. This is an earlier case than the case of *Penn. Railroad Co.* v. *Sonman Shaft Coal Co.* (1916), 242 U. S. 120, 124, 37 S. Ct. 46, 48 cited by this court and is distinguishable. A major element in *Pitcairn Coal, supra,* was preferential treatment of certain shippers. This was a prime reason for requiring the parties to first proceed before the Interstate Commerce Commission. In the instant proceeding, however, no discrimination has been raised as an issue.

The Court of Appeals also failed to apply the true distinction between a Commission matter and a matter for the courts as enunciated by this Court in the *Sonman* case *supra* (242 U. S. page 127). There the conditions in the coal trade were normal and the demand for cars was reasonable. There was no unusual or abnormal condition *not reasonably to have been foreseen* by the railroad such as an extraordinary volume of coal traffic or an unusual detention of cars on other lines of the railroad. There must be an element of the unforeseen to constitute an emergency car shortage requiring Commission action and not a condition caused by long term neglect on the part of the railroad as complained of in the current proceeding. This is consistent with the earlier holdings of this court. *Pennsylvania R. Co.* v. *Puritan Coal Min. Co.* (1914), 237 U. S. 121, 133, 35 S. Ct. 484.

In the case now before the court we have a situation which has steadily worsened over a period of 15 years because of the failure of the railroads over a long period of time to replace such a large number of its worn out cars that the railroads are now unable to transport the crops of the territory in question within a reasonable time.

3. The Passage of Public Law 89-430, 80 Stat. 168 Shows the Congressional Intent That This Petitioner and Others Suffering From a Car Shortage Retain Their Rights to Judicial Remedy.

The controlling decision of this court in *U. S.* v. *Penn. Railroad Co.* (1916), 242 U. S. 208, 37 S. Ct. 95, held that the Courts, not the Interstate Commerce Commission, had jurisdiction to compel carriers to acquire adequate facilities for transportation. The Commission in its brief Amicus Curiae *supra* likewise admitted it had no such powers. Likewise, *Public Law 89-430;* 80 Stat. 168 effective September 1, 1966, gave the Commission no authority to order the railroads to acquire cars but only gave the Commission authority to encourage the carriers to acquire more equipment by the indirect means of heavy charges for use of another carrier's car. Since Congress must be presumed to have known the prior holdings of this Court and the consistent administrative practices in connection therewith, and still did not give the Commission the authority to order the acquisition of equipment, the power to require the railroads to provide and furnish transportation upon reasonable request therefor under *United States Code Annotated,* Chapter 49, Sec. 1 (4) must remain where this court and Congress by Sec. 23 of such chapter left it, that is, in the courts. (For quotation of the terms of these acts see Appendices D and E, pages 15 and 16 of the Petition for Writ of Certiorari.)

CONCLUSION.

Therefore, the Illinois Agricultural Association through its attorney George E. Merker, Jr. prays that a Writ of Certiorari as sought by the Petitioner be issued in this cause.

Respectfully submitted,

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